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No. 364

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

ELDON E. WOLFE AND SARA A. WOLFE, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Tax Court (Appendix, *infra*, pp. 7-16) is reported at 43 T. C. 572 (1965). The opinion of the court of appeals (Appendix, *infra*, pp. 17-28) is not yet reported.

JURISDICTION

The judgment of the court of appeals was rendered on April 22, 1966, and it was entered on that date. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED

Whether or not salary received by a United States Government employee for services rendered abroad to a foreign government, which salary was paid out of or reimbursed

from funds provided by the foreign government, was "paid by the United States or an agency thereof" and consequently not excluded from taxation by the United States under the pertinent provisions of the Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 911. Earned Income from Sources Without the United States.
>
> (a) *General Rule.*—The following items shall not be included in gross income and shall be exempt from taxation under this subtitle:
>
> • • • • •
>
> (2) *Presence in Foreign County for 17 Months.*—In the case of an individual citizen of the United States, who during any period of 18 consecutive months is present in a foreign country or countries during at least 510 full days in such period, amounts received from sources without the United States (except amounts paid by the United States or an agency thereof) if such amounts constitute earned income (as defined in subsection (b)) attributable to such period;—
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> • • • • •

(26 U.S.C. (1958 ed.) 911.)

STATEMENT

Petitioner,[1] as a career Civil Service employee of the Bureau of Public Roads, U. S. Department of Commerce (hereinafter referred to as the "Bureau"), was assigned by the Bureau to duty in Iran during the years 1957-60. Assignment was pursuant to an agreement between the Bureau and Iran (Joint Appendix p. 34, *et seq*) whereby the Bureau agreed to assist Iran in developing a modern highway program by assigning its personnel to duty in that country (JA p. 36) and by procuring the equipment (JA p. 39)

[1] Mrs. Wolfe is a party solely because joint returns were filed for 1959 and 1960. Counsel refers to Mr. Wolfe as petitioner.

necessary to carry out the program. All expenses incurred by the Bureau in performing the agreement, including payment of petitioner's salary, were paid out of or reimbursed from a Dollar Working Fund (JA pp. 12, ¶ 11, & 37-39) provided by Iran from the proceeds of its loan from the Export-Import Bank of Washington. (JA pp. 34-35 & 18, *et seq.*) The Bureau's furnishing of the services of petitioner was contingent upon Iran providing the funds necessary to pay the cost of such services. (JA p. 13, par. 15) The entire amount of this loan, plus interest, has been repaid by Iran. (JA p. 11, par. 4)

Petitioners, in their joint income tax returns for the years 1959 and 1960, excluded from petitioner's gross income his salary received while assigned to Iran. This exclusion was based upon Sec. 911 (a) (2) of the I.R.C., p. 2, *supra*. The Commissioner determined that the exclusion should not be allowed and issued a Notice of Deficiency to petitioners on February 27, 1963. (JA p. 5, *et seq*) Petitioners petitioned the Tax Court for a redetermination of the deficiencies (JA pp. 2-4), which relief was granted by the Tax Court (Appendix, *infra*, pp. 7-16).

The court of appeals, one judge dissenting, reversed the Tax Court on the ground that the salary in question was "paid by" an agency of the United States and consequently not exempt from taxation under Sec. 911(a) (2) of the Code. (Appendix, *infra*, pp. 17-28)

REASONS FOR GRANTING THE WRIT

1. It is respectfully submitted that an early and definitive exposition by this Court of the long standing tax statute (1st enacted in 1932) involved in this case is of far reaching present and continuing importance to the public interest. Evidence of the scope of the present need for such clarification was emphasized by the Government in the court below on page 23 of its brief, to wit: "This is an important case. Thirteen cases involving the issue in this case are being held

in suspense pending final resolution of this appeal. These cases involve 33 taxable years and a total of $52,000. In addition, approximately 215 other taxpayers are being investigated for years prior to 1963 in connection with income excluded pursuant to Section 911, with each case depending entirely on the proper interpretation of 'paid by.' Such taxpayers excluded from their respective incomes approximately $4,000,000."

In view of the increasing public and Congressional opposition to grants of non-military aid to foreign countries, it is logical to assume that the United States' future assistance to under-developed nations will be largely financed by business type loans to such countries, and that a substantial portion of such assistance will be provided by contracts between foreign governments and Federal agencies having personnel qualified to provide the need technical assistance.

Also, it will be of continued vital importance to the United States to maintain its gold reserves by increasing our foreign export of goods and services. Contracts by Federal agencies as noted above are significant factors in promoting exports, as is exemplified by the agreements in this case between Iran and the Export-Import Bank of Washington (JA, p. 19) and the Bureau of Public Roads (JA, pp. 35 & 39). Thus, the tax statute interpretation sought herein will be of increasing public concern in future years, and any uncertainty in regard thereto will result in extensive disputes between numerous taxpayers and the Internal Revenue Service at both the administrative and judicial levels. This uncertainty would undoubtedly deter many Federal employees from accepting such foreign assignments, thus significantly impeding the development of our nation's export trade.

2. The decision of the District of Columbia Circuit is in direct conflict with that of the Ninth Circuit in *Erlandson v. Commissioner*, 277 F2d 70 (1960). In that case the court, in construing subject statute, held that a private company employee's salary paid from funds furnished the company

for that purpose by the United States was "paid by" the United States and consequently not exempt from taxation. In so holding the court concluded that the phrase "paid by" referred to the entity which furnished the funds for payment, and not to the entity contractually liable to the employee for salary payment. In the instant case the Court of Appeal for the District of Columbia Circuit concluded that statutory phrase referred not to the entity which furnished the salary funds, but rather to the entity which actually executed the salary checks and which was contractually obligated to its employee for such payments.

3. The decision of the court below is erroneous. Although there are no adjudicated cases (other than the Tax Court decision in favor of the petitioners herein) involving the specific factual situation present in this case, the only three analagous decisions,[3] in addition to *Erlandson, supra,* were rendered by the Tax Court during an eleven-year period and follow the same rationale, to wit: that the phrase "paid by", as used in subject statute, refers to the entity which bears the economic burden of salary payment, and that the question of who has the contractual liability for and actually disburses the salary is not material.

It is of significant interest to note that in each of these four cases the Commissioner prevailed by advocating the identical statutory construction relied upon in this case by the taxpayers. Such inconsistency by a Federal agency in the administration of a statute is a flagrant example of the current tendency of some Federal administrative agencies to amend the laws of Congress by the issuances of rules, regulations and policy directives. This case offers a clear opportunity for this Court to condemn such unconstitutional encroachments upon the legislative branch of our Government.

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[3] *Leif J. Sverdrup,* 14 T. C. 859 (1950); *Robert W. Teskey,* 30 T. C. 456 (1958); and *Laurence P. Dowd,* 37 T. C. 399 (1961).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

E. E. WOLFE, JR.,
Counsel for Petitioners.

JULY 1966.

APPENDIX

43 T.C. 572

Tax Court of the United States

ELDON E. WOLFE AND SARA A. WOLFE, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 1651-63. Filed January 29, 1965

FINDINGS OF FACT

Nearly all of the facts have been stipulated and the stipulation of facts, together with the exhibits attached thereto, is incorporated herein and made a part of our Findings by reference.

The petitioners, husband and wife, are both United States citizens and currently reside in Washington, D. C. They filed their joint Federal income tax returns for the years 1959 and 1960 with the Director of International Operations, Washington, D. C. For the year 1959 they excluded the amount of $14,578 from their gross income under section 911 of the 1954 Code. Of that amount, $1,609 was earned by Sara A. Wolfe as an employee of the Iran-American Society. There is no dispute as to this amount. For the year 1960 petitioners excluded $7,302.51 from their gross income on the same grounds.

Eldon E. Wolfe, during the years at issue, was employed as a highway bridge engineer by the Bureau of Public Roads which is part of the United States Department of Commerce. The Bureau of Public Roads (sometimes hereinafter referred to as Bureau) is an "agency" of the United States as that word is used in the parenthetical phrase "except amounts paid by the United States or any agency thereof," in section 911 of the Internal Revenue Code of 1954.

On December 7, 1956, the Imperial Government of Iran entered into a credit agreement with the Export-Import Bank of Washington(hereinafter referred to as Eximbank)

in connection with a road construction project in Iran. The project involved the Bureau of Public Roads in an undertaking which was entered into by such agency with Iran pursuant to and in accordance with the applicable provisions of the Mutual Security Act of 1954.

Pursuant to the provisions of article III of the credit agreement of December 7, 1956, Iran designated the Riggs National Bank of Washington, D. C., as the depositary for funds constituting the revolving fund which was to be "used by Iran exclusively for the purpose of financing United States dollar expenditures in connection with the Project."

In accordance with the provisions of articles III and IV of the credit agreement, Eximbank advanced to the Iranian Government the total sum of $947,597.96 over the years 1957, 1958, and 1959.

The loan agreement contained a number of restrictions, including a maximum line of credit of $5,000,000; the requirement that Iran submit detailed financial statements before each succeeding $500,000 advance; and a negative pledge that no other external debt of the Iranian Government would have priority over this loan. According to the terms of articles X and XI and default in the prompt and full payment of any installment of principal or interest on any advance under the loan was to make the entire principal and interest become payable at the option and demand of the holder. As of January 1, 1964, Iran had repaid the entire amount of this loan, plus the interest, to Eximbank.

The credit agreement also prescribed in article XVII that prior to and as a condition of the first advance under the loan the United States Bureau of Public Roads would make arrangements satisfactory to the Eximbank under which the Bureau would provide the services of United States engineers and technicians to carry out the project. It was this aspect of the agreement that brought the petitioner, Eldon E. Wolfe, to work in Iran.

Prior to April 7, 1956, the petitioner was employed in the competitive civil service of the United States Government. On April 7, 1956, he terminated his competitive service status, and received an appointment in the excepted service of the United States Government on the following day. He was then assigned to perform services in Pakistan as an employee of the Bureau of Public Roads. On June 22, 1957,

the petitioner was transferred from Pakistan to the Iran Division in Tehran.

Neither the Iranian Government nor any of its employees was empowered to, or did, supervise or control the work of any of the employees of the Iran Division. The Iranian Government could not hire or fire any of the employees of the Iran Division or in any manner control the salary paid or the promotions given to any of the personnel of the Bureau of Public Roads assigned to the Division.

The petitioner and his wife left Iran on April 5, 1960, for the United States, and reported to Washington, D. C., for duty on May 24, 1960. Effective July 10, 1960, he was officially transferred from the Iran Division to the Office of Engineering, Bridge Division, Bureau of Public Roads, United States Department of Commerce, Washington, D. C.

The transfer of the petitioner from Pakistan to Iran in 1957 was an action taken by the Bureau of Public Roads at its initiative and that of the petitioner, but not that of any foreign government.

Pursuant to the requirement in article XVII of the credit agreement that some arrangement be entered into between the Bureau of Public Roads and the Imperial Government of Iran for the loan of Bureau employees, a letter agreement was signed between the two governments on December 18, 1956. This letter agreement specified that the Bureau would assign a certain number of personnel for a period not to exceed 2 years unless the credit agreement was extended.

The fundamental mechanics of payment of the assigned employees are described in the agreement as follows:

> V. COMPENSATION OF PERSONNEL ASSIGNED TO IRAN
>
> The compensation of all personnel of the Bureau assigned to Iran from the date of assignment to the date of separation from the program will be paid or reimbursed out of the Dollar Working Fund to be established by your Government [Iran] as provided in Paragraph VII.
>
> The compensation of each employee will include his salary, post differential, post allowance, quarters allowance, education allowance, and separation allowance, all

as prescribed for an employee of the Bureau of his grade and term of service by the applicable United States statutes and regulations as now in effect or hereafter amended. Salaries and wages will be paid on the basis of a 40-hour week in accordance with the existing United States regulations.

• • • • •

VII. DOLLAR WORKING FUND

To carry out the conditions of the $5,000,000 loan from the Export-Import Bank signed on December 7, 1956 your Ministry [Iran] will establish a Dollar Working Fund in the maximum amount of $500,000 with the Bureau to be at the disposal of the Bureau for the payments as set out in this Agreement.

The Dollar Working Fund shall be established in the amount of $200,000 and shall be replenished by your Government [Iran] from time to time upon the request of the Bureau accompanied by an itemized statement signed by an authorized representative of the Bureau setting forth all expenditures made therefrom which have not been reported in any previous itemized statement. With respect to each such expenditures, such statement shall specify the date, purpose and amount thereof and the name and address of the person or other entity receiving the same and shall be accompanied by such supporting documents as your Government [Iran] may reasonably request.

For such replenishment of the Dollar Working Fund by your Government shall be in an amount equal to the total of the expenditures set out in the itemized statement accompanying the request for replenishment. In connection with any such replenishment of the Dollar Working Fund, your Government shall deposit therein such additional amount as the Bureau may recommend and your Ministry may approve to meet prospective expenditures from the Dollar Working Fund; provided, however, that the amount in the Dollar Working Fund at any one time shall not exceed $500,000.

• • • • •

Pursuant to the terms of paragraph VII of the letter agreement of December 18, 1956, a Dollar Working Fund was established by Iran in favor of the Bureau of Public Roads. Checks drawn on the Riggs National Bank by Iran and made payable to the Bureau of Public Roads were deposited with the United States Treasury Department and credited to a trust fund account entitled "Technical Assistance, United States Dollars Advanced From Foreign Governments, Bureau of Public Roads." Salaries paid to Bureau of Public Roads personnel, including the petitioner, who were assigned to the Iran Division throughout 1959 and through July 10, 1960, were either reimbursed from or were directly charged against the Treasury account previously mentioned. This trust fund was not physically segregated in any way. Thus petitioner was paid by a check drawn by the Treasurer of the United States on proceeds of this Dollar Working Fund.

The funds credited to this Treasury account were not appropriated by Congress for salary expenses for Bureau of Public Roads personnel, but were funds provided by the Imperial Government of Iran to which the Bureau was required to account for expenditures on the project.

In article XI of the credit agreement the Iranian Government agreed to indemnify all Bureau personnel from any civil claims arising out of their employment unless such claims were based upon gross negligence or wilful misconduct.

The petitioner did not pay or owe any income taxes to any foreign government based on the salary he received in each of the years 1959 and 1960 from the Bureau of Public Roads.

During the years in question the Bureau of Public Roads deducted from petitioner's salary the regular 6½ percent Federal employee retirement contribution, and an amount representing his contribution for the United States Government Employee Group Life Insurance. Moreover, the petitioner was entitled to exercise rights under the United States Government Employee Group Health Benefits Program.

The petitioner is a career civil service United States Government employee, having commenced his service counting toward career tenure on July 12, 1937. The entire period he

spent assigned to the Iran Division counted as service toward his career tenure. During his service in Iran petitioner received periodic grade and in-grade step increases, as well as a foreign differential allowance equal to 10 percent of his applicable base salary rate.

OPINION

KERN, *Judge:* The question in this proceeding is whether the salary received by the petitioner for services which he performed in Iran constitute "amounts paid by the United States or any agency thereof" within the terms of section 911 of the Internal Revenue Code of 1954.[1]

---

[1] SEC. 911. EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES.

(a) General Rule.—The following items shall not be included in gross income and shall be exempt from taxation under this subtitle:

(1) Bona fide resident of foreign country.—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Secretary or his delegate that he has been a bona fide resident of a foreign country or countries for an uninterrupted period which includes an entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts constitute earned income (as defined in subsection (b)) attributable to such period; but such individual shall not be allowed as a deduction from his gross income any deductions (other than those allowed by section 151, relating to personal exemptions) properly allocable to or chargeable against amounts excluded from gross income under this paragraph.

(2) Presence in foreign country for 17 months.—In the case of an individual citizen of the United States, who during any period of 18 consecutive months is present in a foreign country or countries during at least 510 full days in such period, amounts received from sources without the United States (except amounts paid by the United States or an agency thereof) if such amounts constitute earned income (as defined in subsection (b)) attributable to such period; but such individual shall not be allowed as a deduction from his gross income any deductions (other than those allowed by section 151, relating to personal exemptions) properly allocable to or chargeable against amounts excluded from gross income under this paragraph. If the 18-month period includes the entire taxable year, the amount excluded under this paragraph for such taxable year shall not exceed $20,000. If the 18-month period does not include the entire taxable year, the amount excluded under this paragraph for such taxable year shall not exceed an amount which bears the same ratio to $20,000 as the number of days in the part of the taxable year within the 18-month period bears to the total number of days in such year.

If we answer this question in the affirmative, the petitioner would not be entitled to exclude the wages in question under section 911, and respondent's determination would be sustained.

It is the position of the respondent that the petitioner was paid by the United States and cannot exclude the salary payments derived from his work in Iran because the United States had the primary obligation to pay his compensation. Respondent contends that the proper test in interpreting the statute should be that of "primary legal obligation" or "debt satisfaction." Respondent further urges that the legislative history of section 911 (a)(2) of the 1954 Code indicates that the purpose of the phrased exception to the exclusion was to eliminate possibilities of double taxation. Because no double taxation exists in the case at bar, respondent insists that the exclusion should not apply.

In reply, petitioner argues that the "primary legal obligation" test is incorrect and is not supported by authority. He suggests that the correct construction of the statute involves an inquiry into who bears the economic burden of the salary payment, or asking who has the real ownership of the funds from which the payment is made. He insists that under the facts the United States acted in a mere paymaster capacity. Moreover, he contends that despite any legislative history to the contrary, the respondent's contentions would do violence to the plain language of the statute. In support of this point petitioner cites *Krichbaum v. United States*, 138 F. Supp. 515.

(b) Definition of Earned Income.—For purposes of this section, the term "earned income" means wages, salaries, or professional fees, and other amounts received as compensation for personal services actually rendered, but does not include that part of the compensation derived by the taxpayer for personal services rendered by him to a corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for the personal services actually rendered. In the case of a taxpayer engaged in a trade or business in which both personal services and capital are material income-producing factors, under regulations prescribed by the Secretary or his delegate, a reasonable allowance as compensation for the personal services rendered by the taxpayer, not in excess of 30 percent of his share of the net profits of such trade or business, shall be considered as earned income.

* * * * *

We are unable to agree with respondent's contention that the "primary legal obligation" test will lead to a correct solution of our problem. Whether petitioner was an employee of the United States or of the Empire of Iran is immaterial. See *Lief J. Sverdrup*, 14 T. C. 859, 866; *Robert W. Teskey*, 30 T. C.456, 461; *Lawrence P. Dowd*, 37 T. C. 399, 406; and *Erlandson v. Commissioner*, 277 F. 2d 70, 72 (affirming a Memorandum Opinion of this Court). The question for our decision is whether the amounts of petitioner's income here in issue were "amounts paid by the United States or any agency thereof." If they were paid by the United States they would be includable in petitioner's gross income according to the views expressed in the cited cases, even though petitioner was not an employee of the United States. Conversely it would follow that if they were not paid by the United States or an agency thereof they would not be includable in petitioner's gross income even though petitioner was an employee of the United States.

The precise question here is whether the checks issued to petitioner by the Treasurer of the United States for the amounts in issue and paid from funds which were owned by the Iranian Government and which had been deposited by that Government with the Bureau of Public Roads for that purpose were issued by the United States in the role of a payor or in the role of a paymaster for the Iranian Government.

The facts in the instant case are quite similar to those in *Krichbaum v. United States, supra.* There, as here, the taxpayer was an employee of the Bureau of Public Roads of the United States Department of Commerce, was "loaned" by his regular employer to a foreign government (Ethiopia) for work therein, and was paid by checks drawn by the United States which were paid from funds borrowed by the Ethiopian Government from the International Bank and deposited by it with the United States for the purpose of paying the salaries of the taxpayer and others who had been "loaned" by the American Government. In that case it was held that the amounts so paid to the taxpayer were not "amounts paid by the United States or any agency thereof" and, accordingly, were not includable in the taxpayer's gross income.

Respondent contends that the *Krichbaum* case is distinguishable from the instant case since in that case the

Ethiopian Government expressly assumed the obligation to pay the salaries of the personnel "loaned" to it by the Bureau and therefore the salary of the taxpayer in that case was a debt of Ethiopia which was paid with Ethiopia's money, while in the instant case there was no express assumption by the Iranian Government of the obligation to pay petitioner's salary while he was on loan to Iran.

While the assumption by the Iranion Government of an obligation to pay the salaries of the personnel "loaned" to it by the Bureau of Public Roads was not as specific and categorical as the assumption of such liability by the Ethiopian Government in the *Krichbaum* case, we are of the opinion that the letter agreement of December 18, 1956, entered into between the Bureau and the Government of Iran, from which we have quoted in our Findings, clearly indicated that the Iranian Government undertook the obligation of paying petitioner's salary out of its own funds. It provided that "[t]he compensation of all personnel of the Bureau assigned to Iran * * * will be paid or reimbursed out of the Dollar Working Fund to be established by [the Iranian] Government" and that "[t]he Dollar Working Fund shall be established in the amount of $200,000 and shall be replenished by [Iran] from time to time upon the request of the Bureau," from which the Bureau was to make "the payments as set out in this Agreement," which included the compensation of personnel assigned to Iran. Simply stated, the Government of Iran, wishing to have road construction work done in Iran with the aid of trained personnel of the Bureau of Public Roads and as an inducement to the Bureau to furnish such personnel, not only agreed that the salaries of such personnel would be paid from funds belonging to Iran but also, in effect, guaranteed the payment of such salaries by depositing its funds with the Bureau so that the Bureau could cause the issuance of checks against these funds for that purpose.

In our opinion the question of whether the obligation of the Iranian Government ran directly to petitioner and the question whether the obligation of Iran in connection with the payment of petitioner's salary was primary or secondary are irrelevant. See *Erlandson v. Commissioner, supra* at 73. The point is that pursuant to an obligation of some kind imposed on it by the letter agreement of December

18, 1956, the Iranian Government authorized the payment from its funds of petitioner's salary earned by the performance of services to Iran at its request and for its benefit. It is our opinion that in drawing the checks upon the funds belonging to Iran for the payment of petitioner's salary, under the circumstances of this case, the officials of the United States were acting as paymasters for Iran and that the amounts of such salary were not "amounts paid by the United States or any agency thereof."

Decision will be entered for the Petitioners.

United States Court of Appeals for the District of Columbia Circuit

No. 19617

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ELDON E. WOLFE AND SARA A. WOLFE, RESPONDENTS

[April 22, 1966]

Petition for Review of Decision of the Tax Court of the United States

Before: BAZELON, Chief Judge, and FAHY and LEVENTHAL, Circuit Judges.

LEVENTHAL, *Circuit Judge:* Respondents are husband and wife who filed a joint return in 1959 and 1960, the tax years subject to the dispute in this case. They sought exclusion, under § 911(a) (2) of the Internal Revenue Code of 1954, of amounts earned by them while residing and working in Iran during the years in question. The Commissioner allowed the exclusion of the wife's income in Iran. The sole question is whether respondent Eldon E. Wolfe properly excluded, as exempt from federal income taxation, amounts earned while employed by the United States Bureau of Public Roads to work on a highway project of the Government of Iran.

Section 911(a) (2) exempts from taxation earned income received by a United States citizen located in a foreign country for eighteen consecutive months if such income constitutes "amounts received from sources without the United States (except amounts paid by the United States or an agency thereof)." Mr. Wolfe satisfies the foreign residency requirements of § 911. The question is whether the amounts received by him from his employer, the United States Bureau of Public Roads, are to be considered "amounts paid by the United States or an agency thereof," and thus outside the scope of the exemption.

On December 7, 1956, the Government of Iran entered into a credit agreement with the Export-Import Bank (Eximbank) in Washington with respect to a road construction project in Iran. Pursuant to this agreement Iran de-

posited in the Riggs National Bank in Washington funds, out of the proceeds of the Eximbank loan, to be used "exclusively for the purpose of financing United States dollar expenditures in connection with the Project." The credit agreement also provided that prior to and as a condition of the first advance under the loan to Iran, the Bureau of Public Roads would make arrangements satisfactory to Eximbank for providing the services of United States engineers and technicians for the road construction project. It was this aspect of the agreement that brought the taxpayer to work in Iran.

The Tax Court concluded that taxpayer was entitled under § 911(a)(2) to exclude from his income the salary paid him by the Bureau of Roads for his work in Iran. 43 T. C. 572 (1965). It reasoned that since the reimbursement provisions of the credit agreement between the Eximbank and Iran placed the ultimate burden of taxpayer's salary on the Government of Iran, Wolfe's salary did not represent "amounts paid by the United States or an agency thereof." In drawing the checks upon the funds belonging to Iran for the payment of petitioner's salary," concluded the Tax Court, "the officials of the United States were acting as paymasters for Iran." 43 T.C. at 579.

We cannot agree with the Tax Court's interpretation of the statute and its application of the statute to the facts of this case. We disagree, too, with a similar ruling in *Krichbaum v. United States,* 138 F. Supp. 515 (E.D. Tenn. 1956).

A. In our opinion the exception provision has broad sweep as to taxpayers who are employees of the U. S. Government, as well as applying in some circumstances [1] to taxpayers who are not employees. The salient features of this case are certainly sufficient, though we do not say they are all necessary, to establish that taxpayer's salary should be viewed as "amounts paid by the United States or an agency thereof." Four aspects are especially significant.

1. Taxpayer was an employee of the United States maintaining unique status as such and receiving unique benefits as such.

On April 8, 1956, taxpayer, an employee of the Bureau of Public Roads, transferred from the competitive civil service

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[1] *Erlandson v. Commissioner,* 277 F. 2d 70 (9th Cir. 1960); *Laurence P. Dowd,* 37 T. C. 399 (1961); *Robert W. Teskey,* 30 T. C. 456 (1958).

and accepted an appointment offered by the Bureau in the excepted service. He was then assigned to perform services in Pakistan. On June 22, 1957, he was transferred from Pakistan to the Iran Division in Tehran. Neither the Iranian Government nor any of its employees was empowered to, or did, supervise or control the work of any of the employees of the Iran Division. The Iranian Government could not hire or fire any of the employees of the Iran Division or in any manner control the salary paid or the promotions given to any of the personnel of the Bureau of Public Roads assigned to the Division

As a United States Government employee in the excepted service having prior Civil Service status, Wolfe was covered throughout the period by various federal laws giving benefits to Government employees.[2] The Tax Court found (43 T.C. at 576):

> During the years in question the Bureau of Public Roads deducted from petitioner's salary the regular 6½ percent Federal employee retirement contribution, and an amount representing his contribution for the U.S. Government employee group life insurance. Moreover, the petitioner was entitled to exercise rights under the U.S. Government employee group health benefits program.
>
> The petitioner is a career civil service U.S. Government employee, having commenced his service counting toward career tenure on July 12, 1937. The entire period he spent assigned to the Iran Division counted as service toward his career tenure. During his service in Iran petitioner received periodic grade and in-grade step increases, as well as a foreign differential allowance equal to 10 per cent of his applicable base salary rate.

Furthermore, taxpayer had re-employment rights to reinstatement in the competitive service; and he was reinstated in the competitive service effective July 10, 1960.

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[2] These laws are as follows: (1) Performance Rating Act; (2) Government Employees Incentive Awards Act; (3) Federal Employees Pay Act; (4) Annual and Sick Leave Act; (5) Federal Employees Compensation Act; (6) Civil Service Retirement Act; (7) Unemployment Compensation Act; (8) Federal Employees Group Life Insurance Act; (9) Federal Employees Health Benefits Act.

2. The United States had the primary and indeed sole obligation to pay taxpayer's salary, and his rights were only against the United States.

Taxpayer's only contract, whether express or implied through employee status, was with the United States. The parties stipulated:

> Eldon E. Wolfe at not time, and in no event, had any right to request or demand payment of his salary from Iran. Mr. Wolfe did not acquire, by virtue of either his employment agreement with the Bureau of Public Roads or his assignment to the Iran Division, any direct rights against the Iranian Government [except immunity from taxation by Iran].

Taxpayer's only connection with Iran was as an engineer included in a group of employees of the Bureau of Public Roads sent by the Bureau to Iran to assist Iran in developing a highway system. His presence in Iran was in discharge of the obligation of the Bureau, under a letter agreement with Iran, to send experts to assist Iran.

Iran agreed to make funds available to the Bureau in order that the Bureau might pay taxpayer's salary. But the obligation of Iran ran to the United States, not to taxpayer.

It was stipulated that taxpayer had no agreement either with Iran or with the Bureau of Public Roads whereby payment of his salary was to be made out of Iranian funds or was dependent upon advances having first been made by Iran to the Bureau.

3. A United States agency actually executed and delivered the salary checks to taxpayer.

The Tax Court specifically found that taxpayer's salary was paid by a check drawn by the Treasurer of the United States. The record shows that the Treasury checks were drawn on the appropriation of the Bureau of Public Roads.

This payment was reimbursable to the Bureau by Iran through payments by check, payable to the Bureau of Public Roads, which were deposited with the United States Treasury Department and credited to a trust fund account entitled "Technical Assistance, United States Dollars Advance From Foreign Governments, Bureau of Public Roads." Salaries paid to Bureau of Public Roads personnel,

including the taxpayer, who were assigned to the Iran Division throughout 1959 and through July 10, 1960, were either reimbursed from or were directly charged against the Treasury account previously mentioned. This trust fund was not physically segregated in any way.

4. In addition to these three primary factors, there are also in this record secondary facts supporting the Government's position. To take an analogy from the game of bridge, these are not "quick tricks" but rather "plus" values filling in the hand. We note the following:

a. Taxpayer was exempt not only from all income taxes, but also from duties, fees and customs charges of Iran and any political subdivision thereof, by virtue of the agreement between Iran and the Bureau of Public Roads.

b. Taxpayer's income under review includes a 10% increment over his base salary as a foreign post differential.

c. Although the basic salary paid to taxpayer was reimbursed to the Bureau by Iran, there were financial burdens on the U. S. Government which were not compensable by Iran. The agreement provides for reimbursement of salary and certain allowances, but these do not include the "employer" contributions of the Government toward retirement benefits and group life insurance.

d. The Iranian use of personnel provided by the Bureau of Public Roads was a requirement of the U.S. Government (Eximbank) as a condition of the loan to Iran. And, of course, the dollars used by Iran were an advance from the United States Government, which bore the credit risk that the dollar loan might not be repaid.

B. The only fact brought out to support the claim of exemption is the fact that Iran, by agreement, had the obligation to reimburse the United States for its salary payments to taxpayer as its employer. As already noted in item c, this left some economic burden on the United States, But even assuming Iran reimbursed the United States fully, taxpayer's relations were solely with the United States, not at all with Iran.

Ready analogies abound in private economic relations. Frequently an American company agrees to furnish a foreign company with American know-how and to station abroad an American employee equipped to transmit that

know-how. The foreign company typically agrees, in addition to a fee, to reimburse the American company for the salaries paid to its American employees while assigned to the foreign company's premises. It is plain that the American employee assigned to duty on the licensee's premises is receiving amounts paid by his continuing American employer, even though that American company is being reimbursed for his salary, a cost which it incurs in the first instance and for which it is liable to him.

The tax law is concerned with the arrangements of the taxpayer. It is strained to read the law as making his liability to tax depend on arrangements between his employer and some one else which are beyond his sphere of concern.[3]

C. Our interpretation is consonant with and in furtherance of the Congressional objectives underlying the exception to § 911. The legislative history is set forth in *Krichbaum v. United States, supra,* and need not be reviewed at length here.

The original statute exempting from United States taxation the income earned by American citizens abroad was intended to help our foreign trade and to put Americans who work abroad in a position of equality with their competitors by leaving them subject only to the income tax levied on them by the country where they were employed. See 138 F. Supp. at 519.

The exception for amounts paid by the United States or any agency thereof was written into the law in 1932 in what was then § 116 of the Internal Revenue Code. The Senate Finance Committee, which first sought complete elimination of the exclusion of foreign income, made particular reference to the unsuitability of granting the exemption to United States employees, S. REP. No. 665, 72d Cong., 1st Sess. p. 31:

> Furthermore, a considerable proportion of the individuals previously benefited by this sub-section have

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[3] The record shows that when taxpayers were requested by the Internal Revenue Service to provide a copy of the Eximbank credit agreement and other disbursement information, taxpayers had to obtain this from Eximbank, which advised that it was providing this information to taxpayer's attorney as a matter of courtesy to him and Senator Johnston and on the understanding that it would be used only to assist in preparation of the facts in the tax controversy.

> been employees of the United States who, because of their status as such, were usually exempt from any foreign tax upon their compensation received from the United States; these citizens are not believed by your committee to be entitled to a complete exemption from the Federal income tax upon such compensation.

On the floor, Senator Reed disagreed with the Committee on abolishing the exemption entirely, and proposed the exception for United States employees. Hhis views ultimately won out. Senator Reed stated that the purpose of the exemption generally was to avoid double taxation of Americans working abroad, and to put them "in a position of equality with their competitors," but that this was wholly inapplicable to Government employees. (See 75 CONG. REC. 10410):

> We discovered that the provision had been stretched to the point of exempting an American naval officer or army officer who was stationed, let us say, in the embassy in London or in some foreign country, like our troops in China. Those people were getting complete exemption from the American income tax. We discovered further, to our surprise, that it had been held that American ambassadors and ministers and officers of the Foreign Service were getting clear out of the payment of any income tax by virtue of the same provision, which nobody in the world ever intended when the provision was first adopted. These people do not deserve the exemption, because they are not subject to the income taxation of the foreign countries in which they are stationed, any more than we would tax the British ambassador here in Washington on his income.

Taxpayer Wolfe's position clearly falls within the scope of the legislative purpose of the exception. He was a Government employee, and he was not subject to income tax by Iran. The agreement by Iran not to subject him to income tax confirms what would be the normal practice with respect to an employee of a foreign government.

We think the wording of the statute, the ordinary meaning of the words used, and the legislative history, all support the view that basically salaries of U. S. Government employees paid by the U. S. Government are not within

the exemption. We see no basis for inserting a gloss that would make the tax exemption applicable where the Government receives reimbursement (here, not complete reimbursement) from another source having no direct relationship to employee-taxpayer. No difference in legislative intention should be ascribed to the fact that the reimbursement is secured by an advance deposit(here made with funds in turn advanced by the U. S. Government).

It has not been suggested to us why the tax policy or any other policy of the Government would be furthered by giving the employee whose salary cost is thus reimbursed, say, an extra 15 percent or more, depending on his tax bracket, according him a net benefit not conferred, e. g., on an Army officer serving as an aide to the Army of South Vietnam, and relieving him of the obligation resting on all other Government employees to pay federal income tax on their Government salary.

No such distinction based on reimbursement to the Government has been noted in any committee report or similar legislative history. If interjected into the tax law it would create invidious discriminations among the U. S. Government employees assigned for service abroad, dependent on adventitious factors having nothing to do with their employment relationship with the Government or rights to compensation from the Government.

Reversed.

FAHY, *Circuit Judge, dissenting:* I would affirm the Tax Court, whose decision accords with *Krichbaum v. United States,* 138 F. Supp. 515 (Ed D. Tenn.).

Admittedly, all along, taxpayer was an employee of the United States, in an excepted position,[1] and admittedly he could look only to the United States for payment of his salary. But the provision of the tax statute now construed looks to the "source" of the income to be exempted, not to the employer-employee relationship. The provision

[1] The majority relies in good part on government employee benefit programs in which the appellee was allowed to participate by contributing. The government also made small contributions to two of these programs. These contributions grew out of the employer-employee relationship, leaving unanswered in the circumstances of this case the question whether the United States or Iran paid the amounts of salary involved.

must be construed in conjunction with the Export-Import Bank Act of 1945 [2] and the Mutual Security Act of 1954.[3] Under those Acts certain financial arrangements were made between the United States and Iran, as a result of which Iran and not the United States bore the burden of taxpayer's salary while he was on loan to Iran. Except in the formal sense that his salary was remitted to him by check of the United States it was paid by Iran. The payment, though at times referred to as reimbursement, was from a deposit of funds Iran made with the United States as now explained.

Iran has entered into a loan agreement with the Export-Import Bank of Washington. A maximum line of credit of $5,000,000 was established with the Bank. The agreement provided for loan to Iran of employees of the Bureau of Public Roads. It was pursuant to this that respondent husband, an employee of the Bureau, was loaned to Iran. The agreement further provided that compensation of such personnel would be paid or reimbursed out of the "Dollar Working Fund" established under the agreement and acutally on deposit with the United States Treasury Department as a trust fund entitled "Technical Assistance, United States Dollars Advanced from Foreign Government, Bureau of Public Roads." Initially $200,000 was placed in the Dollar Working Fund. The agreement provided that the Fund should be replenished by Iran from time to time at the request of the Bureau, and the parties have stipulated that such funds "have been advanced by foreign governments, as a general rule, prior to the actual expenditure of moneys by the United States." It would appear the requisite deposit by Iran preceded the payment of Wolfe's salary; but even if there were a temporary time lapse this would have no significance. For taxpayer's salary here involved came out of a fund established by Iran in the manner described. It was not paid out of any money belonging to the United States. As the Tax Court found,

> Salaries paid to Bureau of Public Roads personnel, including taxpayer, who was assigned to the Iran Division throughout 1959 and through July 10, 1960,

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[2] 12 U. S. C. §§ 635-35i (1964 ed.)

[3] Mutual Security Act of 1954, ch. 937, § 505(b), 68 Stat. 851.

were either reimbursed from or were directly charged against the Treasury account "Dollar Working Fund" previously mentioned. This trust fund was not physically segregated in any way. Thus taxpayer was paid by a check drawn by the Treasurer of the United States on proceeds of this Dollar Working Fund. The funds credited to this Treasury account were not appropriated by Congress for salary expenses for Bureau of Public Roads personnel, but were funds provided by the Imperial Government of Iran.

Consideration of the objectives of the provisions under which American personnel are obtaned by foreign governments supports the view that the salary was tax exempt as paid by Iran. The statutes under which the monetary loan to Iran was made and personnel obtained, set forth the objectives to be in part "to aid in financing and to facilitate exports and imports and the exchange of commodities between the United States . . and any foreign country or the agencies or nationals thereof. . . ." [4] Under the agreement with Iran, in addition to loan of men, the funds borrowed were to be expended mainly in the United States in the purchase of equipment and the like. This is an immediate and measurable benefit to the economy of the United States. The loan of the men, however, was intended to have a long range effect on our economy by putting Iran in a better position to engage in foreign commerce through improved internal transportation. These benefits to the United States are achieved without reference to whether appellee's salary is taxed by the United States.

Moreover, legislative history shows that the general exemption was intended to encourage technical personnel to go abroad in furtherance of our political and economic objectives; that is, to encourage a bridge engineer like Mr. Wolfe to accept an assignment in Iran. When the exception "(except amounts paid by the United States or any agency thereof)" was added by the 72d Congress the legislators were focusing on those who were in the service of the United States and were abroad as a regular and ordinary incident of that service, namely, military and diplomatic personnel, not the volunteer who must be in-

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[4] Export-Import Bank Act of 1945, 12 U. S. C. § 635(a) (1964 ed.). Also see Mutual Security Act of 1954, ch. 937, § 301, 68 Stat. 841.

duced to go abroad. As Senator Reed said: "I was proposing to tax Americans who I think are unfairly exempted now, like officers of our military service and our Diplomatic Service . . ." 75 Cong. Rec. 10411 (1932). In adding what is now subsection (a) (2) of Section 911, which is our concern here, the Senate Committee specifically stated that this exemption was meant to encourage technical personnel to agree to work abroad for short periods of time in furtherance of our foreign aid policy: ". . . managers, technicians, and skilled workmen . . . are induced to go abroad for periods of 18 to 36 months to complete specific projects. Your committee believes, in accord with the point 4 program, that it is particularly desirable to encourage men with technical knowledge to go abroad." S. Rep. 781, 82d Cong., 1st Sess. 53 (1951).

In a lengthly and well-balanced review of the history of the statute up to 1956 the District Court for the Eastern District of Tennessee, in the case of *Krichbaum v. United States, supra,* came to the conclusion reached by the Tax Court in the present cse. The court there held that wages earned in Ethiopia by an employee of the Bureau loaned to that country, borne by money borrowed from the International Bank and transferred to the Government of the United States to cover the salary and other expenditures, were not to be included in gross income as "amounts paid by the United States or any agency thereof." The court said:

> If the United States is not the debtor but simply pays the amount which is in fact a debt of another debtor the amount so paid is within the exemption and without the exclusion in the exemption.

In the several instances in which Congress has amended the statute, three times since *Krichbaum,* no effort appears to have been made to clarify further the particular problem involved in *Krichbaum* and in our case. Since the problem has had the continuing attention of Congress through the years, it is fair to give some weight to Congressional silence in the face of three other amendments to Section 911 in the nine years since *Krichbaum.*

Absent further Congressional action it seems to me the Tax Court in our case, and the District Court in *Krichbaum,* reached the correct decision; that is, that since

Iran actually paid the salary it should not be held to be an amount "paid by the United States or any agency thereof" within the intent and meaning of Section 911, though transmitted by a check of the United States. The amount was not taken from funds of the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 364

ELDON E. WOLFE AND SARA A. WOLFE, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner,[1] a career Civil Service employee of the United States Bureau of Public Roads, was sent to Iran to work on a road building project. His salary was paid by the United States, which was reimbursed by Iran. In general, the Internal Revenue Code exempts from taxation income earned by an American citizen who has worked outside the United States for at least 17 out of 18 consecutive months. Code § 911(a)(2). Excepted from the scope of this exemption are "amounts paid by the United States or any agency thereof." *Ibid.* If, as the court of ap-

[1] Mrs. Wolfe is a party only because she and her husband filed a joint return. Mr. Wolfe will be referred to as petitioner.

peals concluded, petitioner's salary earned in Iran was "paid by the United States" within the meaning of § 911(a)(2), it is taxable; otherwise, it is exempt.

That the salary was, literally, "paid by the United States" is undisputed. This should have ended the matter; but petitioner asserts that there is "uncertainty" in the "interpretation" of the statute (Pet. 4), and that the phrase "paid by" as used therein "refers to the entity which bears the economic burden of salary payment" (Pet. 5)—in this instance, presumably, Iran. The majority of the court of appeals, in rejecting these contentions below, concluded (Pet. 24):

> No such distinction based on reimbursement to the Government has been noted in any committee report or similar legislative history. If interjected into the tax law it would create invidious discriminations among the U.S. Government employees assigned for service abroad, dependent on adventitious factors having nothing to do with their employment relationship with the Government or rights to compensation from the Government.

If anything need be added to the analysis (Pet. 21–24) which led to this conclusion, we would suggest that this Court has repeatedly rejected efforts to read "economic burden" into the law in other, not unrelated, tax contexts.[2] The majority below quite

[2] See, *e.g.*, *Maximov* v. *United States*, 373 U.S. 49, 52; *Biddle* v. *Commissioner*, 302 U.S. 573, 581; *Anderson* v. *Wilson*, 289 U.S. 20, 26–27; and see also such intergovernmental immunity cases as *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U.S. 342,

correctly applied the salutary rule that "those who seek an exemption from a tax must rest it on more than a doubt or ambiguity." *United States* v. *Stewart,* 311 U.S. 60, 71.

As to the asserted conflict (Pet. 4–5) with *Erlandson* v. *Commissioner,* 277 F. 2d 70 (C.A. 9), it is nonexistent.[3] In *Erlandson,* the United States had engaged a company which, "as the government's agent 'and not as an independent contractor,'" managed a vessel owned by the United States (p. 71). The court concluded that when the agent received money from the United States and used it to pay the crew's wages, the United States had actually made the payment, through its agent. In the present case there is no principal-agent relationship between the governments of Iran and the United States.

There is no conflict of appellate decisions, and the instant decision of the court of appeals is correct. The petition for certiorari should therefore be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

HAROLD C. WILKENFELD,
Attorney.

AUGUST, 1966.

363–364; *Alabama* v. *King & Boozer,* 314 U.S. 1, 8–9; *Curry* v. *United States,* 314 U.S. 14, 18; *Helvering* v. *Gerhardt,* 304 U.S. 405, 417, 420–423.

[3] Nor is there any basis for the allegation (Pet. 5) that the government has taken an inconsistent position in *Erlandson* and other "analogous decisions."

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